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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 938

M. S. CHAMBLISS and C. L. GIBSON,

Petitioners,

v.

COCA-COLA BOTTLING CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Statutes Involved	2
Statement of the Case	2
Argument	3
Conclusion	7
Appendix	8
Opinion of the United States Court of Appeals for the Sixth Circuit in the prior case	8
Petition for Rehearing filed by Petitioners in the Sixth Circuit in the instant case	13
Tennessee Code Annotated:	
Section 48-1602 (A)	14
Section 48-1602 (F)	14
Section 48-1632 (B)	14
Section 48-1633	15

TABLE OF CASES

Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963)	5
Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943)	6
DeSylva v. Ballentine, 351 U. S. 570 (1956)	3
Helvering v. Minnesota Tea Co., 296 U. S. 378 (1935)	3
Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U. S. 814 (1961)	4
Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960)	5

PAGE

Kerr v. Compagnie de Ultramar, 250 F.2d 860 (2d Cir. 1958) 6

McCullough v. Kammerer Corp., 323 U. S. 327 (1945) 3

Michel v. Louisiana, 350 U. S. 91 (1956) 3

Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir. 1944), *cert. denied* sub nom. Orange Theatre Corp. v. Brandt, 320 U. S. 740 (1944) 6

Rice v. Sioux City Memorial Park Cementery, Inc., 349 U. S. 70 (1955) 7

Rudolph v. United States, 370 U. S. 269 (1962) 7

Smartt v. Coca-Cola Bottling Corp., 318 F.2d 447 (6th Cir. 1963) 1, 5

Vaughan v. Atkinson, 369 U. S. 527 (1962) 3

Wolf v. Weinstein, 372 U. S. 633 (1963) 6

TABLE OF STATUTES

Tennessee Code Annotated:

Section 20-220 (vol. 4, p. 258) 2

Section 48-923 (Vol. 8A, pp. 849-50) 2

Section 48-1602 (A) (vol. 8A, pp. 886-87) 2

Section 48-1602 (F) (vol. 8A, pp. 886-87) 2

Section 48-1602 (H) (vol. 8A, pp. 886-87) 2

Section 48-1632 (B) (vol. 8A, p. 912) 2

Section 48-1633 (vol. 8A, p. 914) 2, 5

United States Code:

Title 15, section 78aa (Securities Exchange Act of 1934, section 27) 2

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COCA-COLA BOTTLING CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully submits that the Petition for Writ of Certiorari in this case should be denied.

OPINIONS BELOW

In addition to the opinions mentioned in the Petition, the opinion of the Sixth Circuit in *Smartt* v. *Coca-Cola Bottling Corp.* (6th Cir. 1963), reported at 318 F.2d 447, affirming the dismissal on jurisdictional grounds of a prior action based on the same transaction involved in the instant case, and referred to in the opinion rendered in the instant case, is appended hereto at page 8.

STATUTES INVOLVED

This case involves the construction of sections 20-220 (volume 4, page 258) and 48-923 (volume 8A, pages 849-50) of the Tennessee Code Annotated, as well as certain provisions of the Tennessee Securities Law of 1955, appearing as sections 48-1602 (A), (F), and (H) (volume 8A, pages 886-87), 48-1632 (B) (volume 8A, page 912), and 48-1633 (volume 8A, page 914) of the Tennessee Code Annotated. Sections 20-220, 48-923, and 48-1602 (H) are set out at pages 10-11 of the Petition herein; sections 48-1602 (A) and (F), 48-1632 (B), and 48-1633 are set out at pages 14-15 infra.

STATEMENT OF THE CASE

Respondent, defendant below, is a Delaware corporation having its principal office in Cincinnati, Ohio. In December 1960 Respondent adopted a plan of merger and recapitalization under the Delaware Corporation Law, converting its Class "A" shares into debentures.

The instant action, commenced on August 27, 1963, invoked federal jurisdiction on the basis of diversity of citizenship and amount in controversy. Service of summons upon Respondent was attempted only through service upon and through the Tennessee Secretary of State. (Petitioner's brief in the Sixth Circuit, Appendix page 1a.) Until the filing of the Petition for Certiorari, the only mention of a claimed violation by defendant of the Securities Exchange Act of 1934 was in paragraph X of the Amended Complaint (Petitioners' brief in Sixth Circuit, Appendix page 16a); that claim was: "The defendant did not comply with the Securities Exchange Act." There was no attempt to serve process upon Respondent under the provisions of section 78aa of Title 15, United States Code, the provision of the Securities Exchange Act of 1934 authorizing extraterri-

torial service upon out-of-state defendants under some circumstances.

ARGUMENT

I. In the Courts Below Petitioners Did Not Raise the Point That a Claimed Violation in Tennessee of the Securities Exchange Act of 1934 Rendered Respondent Subject to the Personal Jurisdiction of a District Court in That State; Nor Did They Even Cite the Decision With Which That Sought to Be Reviewed Is Now Claimed to Conflict.

From the Petitioners' brief in the Sixth Circuit it is clear that Petitioners did not raise in the courts below the contention now made in the Petition that a claimed (but unspecified) violation by Respondent in Tennessee of the Securities Exchange Act of 1934 rendered Respondent amenable to the jurisdiction of the District Court in Tennessee.

This Court has uniformly adhered to the rule that it will not consider an argument made for the first time in a Petition for Certiorari. *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962) (refusing to express opinion on reasonableness of counsel fees because not considered by either court below); *DeSylva* v. *Ballentine*, 351 U. S. 570 (1956) (where neither court below had ruled on a point, this Court would not decide it on certiorari); *Michel* v. *Louisiana*, 350 U. S. 91 (1956) (even in capital criminal case, contention not raised below not properly in issue on certiorari); *McCullough* v. *Kammerer Corp.*, 323 U. S. 327 (1945) (dismissing certiorari when it appeared that the question for which certiorari had been granted had not been "raised, litigated, or passed upon" below); and *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378 (1935) (point not raised prior to petition for certiorari not considered by the Court).

Therefore, under the rule uniformly applied by this Court, the contentions of Petitioners that claimed (but unspecified) violations by Respondent in Tennessee of the Securities Exchange Act of 1934 rendered Respondent subject to the personal jurisdiction of the District Court sitting in Tennessee cannot be considered by this Court on certiorari.

Similarly the claimed conflict between the decision of the Sixth Circuit in this case and that of the Fifth Circuit in *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), *certiorari denied*, 365 U. S. 814 (1961), is not reviewable here on certiorari. The *Hooper* case was not even cited to the courts below by Petitioners; its decision rested on a finding of fact that an important step in the fraudulent scheme involved in that case had occurred in the forum state; and it is apparent that process had been served on the out-of-state defendants under the Securities Exchange Act of 1934. These facts are not present in the instant case. (See Respondent's brief in the Sixth Circuit, Appendix pages 1b-6b; Petitioners' brief in the Sixth Circuit, Appendix pages 11a-13a; opinion of the Sixth Circuit at page 8 of the Petition herein.) Thus the claimed conflict does not in fact exist; and the alleged conflict would not be reviewable in this Court on certiorari because not pointed out to the courts below—even in the petition for rehearing (appended at page 13 infra).

II. The Question of Amenability to Jurisdiction Because of a Claimed Violation of the Tennessee Securities Law of 1955 Is Primarily a Question of State Law, and Was Correctly Decided on the Facts Found Below.

The opinion of the Sixth Circuit in the prior case, appended at pages 8-13, infra, and its opinion in the instant case, Petitioners' brief, pages 7-8, show that as a matter of fact the court found there had been no conduct by Re-

spondent rendering it subject to the personal jurisdiction of a court in Tennessee, under the Tennessee Securities Law of 1955 or otherwise.

The Tennessee Securities Law of 1955 does not support Petitioners' claim of jurisdiction. The lower courts found either that the transaction was exempt or that Respondent did not sell or offer for sale any securities within Tennessee. However, even if it be assumed that Respondent did violate the Tennessee Securities Law, such a violation would not have authorized substituted service upon Respondent through the Tennessee Secretary of State. The only provisions for substituted service in the Tennessee Securities Law of 1955 require consent by the registrant to service upon him through the Tennessee Commissioner of Insurance and Banking (section 48-1633, Tennessee Code Annotated, appended at page 15 infra). No Tennessee statute or decision equates a violation of the Securities Law of 1955 with "doing business" in Tennessee, or makes such a violation an appointment of an agent for service of process, as do the nonresident motorist and navigator statutes. Respondent submits that the lower courts correctly decided that the claimed violation of the Tennessee Securities Law furnished no basis for personal jurisdiction over Respondent.

In any event, the question of jurisdiction over a foreign corporation in a diversity case is primarily one of state law. This is the rule in the Sixth Circuit, *Smartt* v. *Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir. 1963), and in all other numbered Circuits, as shown by the listing in *Arrowsmith* v. *United Press International*, 320 F.2d 219, 222-23 (2d Cir. 1963) (by the court en banc, bringing the Second Circuit into line by overruling *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960)). Under the rules and practice of this Court, where only a question of state law is presented, with no federal question of substance, a

writ of certiorari will be dismissed even if already granted. *Wolf* v. *Weinstein*, 372 U. S. 633 (1963) (primarily implicated Pennsylvania law, presented no federal question of substance; certiorari dismissed as improvidently granted).

III. The Lower Courts Correctly Held That Respondent's Taking of Depositions Did Not Waive Its Objection to the Personal Jurisdiction of the Court.

It is not disputed that Respondent objected to the personal jurisdiction of the District Court in the motion which it filed before it filed any pleading.

Under the Federal Rules of Civil Procedure the objection to the personal jurisdiction of the court would have been available to Respondent even if raised for the first time in its Answer. Even a "general appearance" in an action does not waive the jurisdictional objection. *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 139 F.2d 871 (3d Cir. 1944), *certiorari denied* sub nom. *Orange Theatre Corp.* v. *Brandt*, 320 U. S. 740 (1944); *Kerr* v. *Compagnie de Ultramar*, 250 F.2d 860 (2d Cir. 1958); *Blank* v. *Bitker*, 135 F.2d 962 (7th Cir. 1943) (taking deposition and obtaining four extensions of time to answer held not a waiver of jurisdictional objection; raising the objection for the first time in the Answer was sufficient).

Respondent submits that the courts below correctly decided the issue of a claimed waiver of the jurisdictional objection, and that no purpose would be served by this Court's review of a decision in accord with the weight of authority.

IV. There Are No "Special and Important" Reasons, Within the Meaning of Rule 19 of This Court, for Granting Review of This Case on Writ of Certiorari.

Respondent submits that the Petition for Certiorari discloses no "special and important" reason why the Court

should grant certiorari in this case. The issues now presented were not raised below, do not exist, are primarily questions of fact and of state law, or have been uniformly decided by the Courts of Appeals. This case does not involve a question of human liberty or constitutional rights, an interpretation of a federal statute, or any other point of Tennessee or federal law upon which this Court should rule to clarify uncertainty or serve the public interest. *Rudolph* v. *United States*, 370 U. S. 269 (1962) (Court will dismiss certiorari as improvidently granted where the case involves merely a review of findings of fact which would be of no importance except to the litigants themselves); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955) (vacating prior affirmance and dismissing writ after full hearing for lack of "special and important" reasons to decide the case even though it directly involved constitutional problems of discrimination).

CONCLUSION

Respondent submits that the Petition For a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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February 4, 1965.

APPENDIX

No. 15026

OPINION OF THE UNITED STATES COURT OF APPEALS For the Sixth Circuit in the Prior Case. (318 F.2d 447)

J. POLK SMARTT and ISABEL SMARTT,
Plaintiffs-Appellants,

v.

COCA-COLA BOTTLING CORPORATION (Sued as CINCINNATI COCA-COLA BOTTLING CO.),
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided June 18, 1963.

Before: WEICK, Circuit Judge, BOYD and THORNTON, District Judges.

BOYD, District Judge. This is a suit for a declaratory judgment and injunction in which the plaintiffs seek to have their rights declared as to a proposed reorganization plan of the defendant corporation, and to enjoin the corporation from "adversely affecting the rights of the plaintiffs and all other holders of Class 'A' stock." Plaintiffs allege that defendant, seeking to serve the interest of Class "B" stockholders, sent notice to all stockholders of a proposed merger plan whereby Class "A" stock would be exchanged for debentures. This notice is alleged to have been misleading. There is further allegation of a failure to pay proper dividends, causing owners of Class "A" stock to

believe the corporation would never be profitable. It is the plaintiffs' contention that such failure misled the majority of Class "A" stockholders into acquiescing in the merger plan. Plaintiffs' contention appears to be that this activity amounts to a breach of a fiduciary trust.

Plaintiffs first obtained service of process upon a stockbroker in Chattanooga, Tennessee. This was quashed pursuant to a finding by the District Court that the broker was not a proper person upon whom service could be had in order to acquire jurisdiction of the defendant corporation. Affidavit of the broker indicates that he only rendered advisory services in connection with the proposed change in the corporate stock structure and aided in soliciting approval of the change during stockholder meetings which were held in Chattanooga, Tennessee, and on other occasions.

Service of process was then had upon the Secretary of the State of Tennessee and upon one of the defendant's directors who resided in Tennessee. This District Court granted a motion to quash service in each of these instances and dismissed the complaint herein on the ground that the defendant was not doing business within the State of Tennessee in such a manner as to make it amenable to suit in said state.

In this connection, defendant submitted the affidavit of its president, which reflects that the corporation at no time made sales of its product in Tennessee, had obtained no license to do so in Tennessee, maintained no office in that state and none of its employees performed duties there.

Jurisdiction of the subject matter herein is based upon diversity and amount and is not in dispute. 28 U. S. C. 1332(a)(1). However, the existence of personal jurisdiction over the defendant, a Delaware corporation whose principal place of business is in the State of Ohio, is in dispute. Our consideration of this appeal ends if we agree with the

District Court that there exists no valid basis of power for the exercise of personal jurisdiction. There need be no review, in other words, of the sufficiency of service of process unless personal jurisdiction is established.

In diversity cases, the question of whether a foreign corporation is present in a state, so as to render it subject to suit in that state, is to be resolved by reference to the law of the state in which the Federal District Court sits. *Dolce* v. *Atchison, Topeka & Santa Fe*, 23 F. R. D 240 (D. C. E. D. (Mich. 1959); *Ketch* v. *Atlantic Coast Line Ry. Co.*, 51 F. Supp. 243 (D. C. E. D. Tenn. 1943); *Pulson* v. *American Rolling Mill Co.* (1 Cir. 1948) 170 F. 2d 193. This is in harmony with the broad pronouncements of Justice Brandeis in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The Tennessee Code provides for the exercise of judicial power over a foreign corporation when such corporation is found to be "doing business" in Tennessee. See Tenn. Code Annotated 20-220 to the effect that any corporation found doing business in the state shall be subject to suit in Tennessee as relates to any cause of action arising there. This statute also provides that any corporation having any transaction through any agency acting for it within the state is "doing business." "Doing business" is the statutory standard to be applied in determining whether a foreign corporation is subject to suit in Tennessee.

It will be seen that the Tennessee courts have not given this statute the broad sweep that its language might suggest. We must ascertain the construction the Tennessee courts have given to this standard and determine whether the fact situation presented herein constitutes doing business in Tennessee so as to subject the defendant corporation to the jurisdiction of a District Court sitting in Tennessee.

The 1938 case of *Denson* v. *Webb*, 23 Tenn. App. 599, 136 S. W. 259, cert. denied 1939, states the then existing Tennessee law to be as follows:

> "We think it too well settled to require the citation of authority that in order to subject a foreign corporation to a suit in this state, the foreign corporation must either be engaged in business in this state, or have an office or agents in this state who are the agents in the sense that they are operating or conducting the business of the foreign corporation in this state."

In a more recent case, *Fisher* v. *Trion, Inc.*, 49 Tenn. App. 82, 353 S. W. 2 406, cert. denied 1961, the Tennessee Court of Appeals reaffirmed the limited scope of the standard of "doing business":

> "A foreign corporation is doing business within the state when it transacts therein some substantial part of its ordinary business, and its operation within the state is continuous in character as distinguished from merely casual or occasional transactions."

But in other later cases in Tennessee there has been a tendency toward broadening the scope and application of the "doing business" concept. In the 1961 case of *Tucker* v. *International Salt Co.*, 209 Tenn. 95, 349 S. W. 2 541, the Supreme Court of Tennessee recognized the Federal standard as set forth by the United States Supreme Court in *International Shoe Co.* v. *Washington*, 326 U. S. 310, which permits the states to exercise jurisdiction over foreign corporations if there are certain minimal contacts that make it fair and reasonable to exercise judicial power. In the *Tucker* case, the court held that activities of the defendant corporation did not amount to anything more than mere solicitation, and therefore the corporation was not doing business so as to confer jurisdiction. The language of the court indicates that it has adopted the federal test used to establish presence of a foreign corporation in a state in order to confer jurisdiction, rather than the more limited and traditional construction of doing business.

Atchison, Topeka & Santa Fe v. *Ortiz*, ... Tenn. ..., 361 S. W. 2 118, cert. denied 1962, further indicates expansion of the scope of "doing business." The Tennessee Court of Appeals therein gave careful consideration to all evidence in determining whether or not the corporation had "so activated itself" in the state that it was subjected to the jurisdiction of its courts. The court then cites *Napelbaum* v. *Atlantic Greyhound Corporation*, 171 F. Supp. 547, in an attempt to broaden the application of the "doing business" standard as applied to cases in which the cause of action arises out of alleged activities of the corporation within the state:

> ". . . The Supreme Court cases cited made it clear that where the cause of action arises out of the activities conducted within the forum no systematic and continuous course of conduct of a substantial nature is required. . . . *International Shoe Co.* v. *Washington*, 326 U. S. 310. . . ."

The Tennessee Courts are governed by the language of the Tennessee statutes and still refer to "doing business" as the test to be applied in determining whether or not a corporation is present within the state so as to make it subject to suit within the state. This test appears satisfied when the minimal contacts making it fair and reasonable to exercise judicial power are established. Tennessee is in step with the trend toward expanding the permissible scope of state jurisdiction over foreign corporations. *Shuler* v. *Wood* (E. D. Tenn.), 198 F. Supp. 801.

In an attempt to establish the sufficient contacts, plaintiffs have alleged in general language that the defendant was guilty of tortious conduct in its relationship with its stockholders. The requisite contacts which confer jurisdiction are readily found to exist if the foreign corporation appears to have committed or threatened some serious dam-

age to person or property. The allegations of the plaintiffs indicate no actual or threatened property damage within the state of Tennessee and there is no Tennessee statute authorizing jurisdiction on this basis. It results that the alleged tortious conduct on the part of the defendant corporation does not, in and of itself, afford a basis of jurisdiction under the Tennessee law.

There are charges in the complaint relating to an alleged violation of the Securities Exchange Act of 1934, Title 15 U. S. C. A. This feature of the case went unnoticed in the District Court. It was given no consideration by either the parties or the district Judge and merits none in this Court.

Upon review of the stipulated facts and the applicable law, the conclusion is inescapable on the jurisdictional question herein that the activities of the defendant in the State of Tennessee were insufficient to establish the minimal contacts required under Tennessee law. It follows that the defendant is not amenable to suit in the State of Tennessee and the judgment of the District Court is in all things affirmed.

Petition for Rehearing Filed by Petitioner in the Sixth Circuit in the Instant Case.

(Filed November 25, 1964)

Petitioners, intervenors in this action, pray for a rehearing on the following grounds:

1. The opinion did not deal directly with the insistence of petitioners that the taking of the depositions of Smartt and Gibson was an appearance in the action.

2. The opinion did not deal with the allegations as to the fact that there was a violation of the Tennessee Securities Act, which petitioners represent made the defendant amenable to process.

(Formal parts omitted.)

Tennessee Code Annotated.

Section 48-1602(A) (volume 8A, pp. 886-87):

"When used in this chapter, unless the text otherwise indicates:

"(A) 'Commissioner' shall mean the commissioner of insurance and banking of this state."

Section 48-1602(F) (volume 8A, pp. 886-87):

" 'Offer to sell' or 'offer for sale' shall mean every attempt to offer or dispose of, or solicitation of an order or offer to buy, a security or interest in a security for value. Every sale or offer for sale of a warrant or right to subscribe to another security of the same issuer or of another issuer, and every sale or offer for sale of a security which gives the holder thereof a present or future right or privilege to convert such security into another security of the same issuer or of another issuer, shall be deemed an offer to sell the security to be acquired by subscription or conversion."

Section 48-1632(B) (volume 8A, p. 912):

"Except as hereinafter in this section expressly provided, §§ 48-1607—48-1618 and 48-1623—48-1628 shall not apply to any of the following transactions:

". . . (B) The sale or exchange by an issuer of its securities to or with its own security holders (including holders of transferable rights with respect to such securities) if no commission or other remuneration is paid or given directly or indirectly for or on account of the procuring or soliciting of such sale or exchange (other than commission or compensation for an undertaking to purchase any of such securities not purchased by security holders in connection with such sale or exchange); or the offer or sale of any securities in exchange for any other securities of the same issuer pursuant to a right of conversion entitling the holder of the securities surrendered in exchange to make such conversion, provided no commission or other remuneration is paid or given directly or indirectly for or on account of the procuring or soliciting of such conversion."

Section 48-1633 (volume 8A, p. 914):

"Where a consent to service of process is required under this chapter, such consent to service of process shall be in the form prescribed by the commissioner, shall be irrevocable, and shall provide that actions arising out of or founded upon the sale of any securities in violation of this chapter may be commenced against the person executing such consent in any court of competent jurisdiction and proper venue within this state, by the service of process or pleadings upon the commissioner. Service of any such process or pleading in any such action against a person who has filed a consent to service with the commissioner shall, if made on the commissioner, be by duplicate copies, one of which shall be filed in the office of the commissioner and the other immediately forwarded by the commissioner by registered mail to the person against whom such process or pleadings are directed at his latest address on file in the office of the commissioner."